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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

ECG MAIL SECTION

FCC 93M-469

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In re Applications of )

MM DOCKET NO. 93-75 ✓

TRINITY BROADCASTING OF FLORIDA, INC. )

DISPATCHED BY  
File No. BPCT-911001LY

For Renewal of License of )  
Station WHFT(TV) on Channel 45, )  
Miami, Florida )

and )

GLENDALE BROADCASTING COMPANY )

File No. BPCT-911227KE

For a Construction Permit for a New )  
Commercial TV Station to operate on )  
Channel 45, Miami, Florida )

MEMORANDUM OPINION AND ORDER

Issued: July 13, 1993

Released: July 15, 1993

1. Under consideration are "Motion To Dismiss Application Of Glendale Broadcasting Company" filed May 13, 1993 by Trinity Broadcasting of Florida, Inc. (TBF), "Contingent Motion To Enlarge Issues Against Glendale Broadcasting Company" filed May 13, 1993 by TBF, Contingent Motion For Production Of Documents filed May 13, 1993 by TBF, Mass Media Bureau's Consolidated Comments On Motion To Dismiss And Contingent Motion To Enlarge Issues filed June 7, 1993, Opposition To Contingent Motion To Enlarge Issues Against Glendale Broadcasting Company filed June 7, 1993 by Glendale Broadcasting Company (Glendale), Opposition To Motion To Dismiss Application Of Glendale Broadcasting Company filed June 7, 1993 by Glendale, Opposition To Contingent Motion For Production Of Documents filed June 7, 1993 by Glendale, "Motion To Strike" filed June 11, 1993 by Glendale, Mass Media Bureau's Opposition To Motion To Strike filed June 22, 1993, and Reply To Opposition filed June 22, 1993 by TBF.

Motion To Dismiss

2. TBF seeks the summary dismissal of Glendale's application based upon allegations that Glendale's transmitter site is not available to it. The motion to dismiss will be denied.

3. As reflected in the declaration of Gregory B. Daly (Glendale Opposition, Att. 1), in approximately November 1991, Daly, using the name Telsa, Inc.,<sup>1</sup> was retained by Glendale to assist in locating a transmitter site.

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<sup>1</sup> Daly recites that he has been in the business of acquiring transmitter sites for approximately 10 years and estimates that during that period of time he has acquired approximately 5000 transmitter sites.

Following a search of existing sites, Daly recommended to Glendale use of space on a tower owned by TAK Broadcasting Corporation (TAK). The TAK tower is the same structure on which TBF's antenna is now located. With the express authorization of Glendale, Daly negotiated for use of the site with James L. Sorensen, TAK Tower Manager and Chief Engineer. Following several telephone conversations, on December 9, 1991, Sorensen wrote a letter to Daly entitled "Letter of Intent to Negotiate an Agreement" stating TAK's willingness to negotiate a site lease with Glendale if Glendale's application is granted. The letter provided, inter alia, that the offer would expire on January 31, 1992.

4. Glendale's site certification submitted with its application filed in late December 1992 is based on Sorensen's December 9 letter. TBF does not argue that the language in the letter is insufficient to grant reasonable assurance of site availability. Instead, TBF argues that Glendale lost its site availability assurance when it failed to deliver an acceptance of the written offer by January 31, 1992. TAK relies on an affidavit from Sorensen who asserts that neither Glendale nor any agent or representative of Glendale delivered to TAK an executed acceptance of the letter of intent and that there has been no further contact between Glendale and TAK.

5. TBF has failed to establish a justifiable basis for the dismissal of Glendale's application. This is not a case where the applicant's site certification was defective and he was therefore barred from curing that defect by amendment. Clearly, Glendale had a valid reasonable assurance letter from the owner of its transmitter site at the time of the filing of its application. Further, Daly's declaration indicates that Glendale did accept TAK's offer in a timely manner. Daly recites that on December 21, 1991, he signed and dated the letter of intent on Glendale's behalf and personally mailed it to Sorensen. Daly has enclosed a document which he states is a true and correct copy of the letter signed by him. Also, Daly states that based on his telephone conversation with Sorensen on or about December 21, 1991 when he informed him that he was going to mail the signed acceptance to him immediately, he was of the opinion that Glendale and TAK had reached an agreement of reasonable assurance of site availability.

6. Even assuming, arguendo, that Daly failed to send the signed acceptance, dismissal of Glendale's application would not be warranted. It is clear that such failure was inadvertent. There is no evidence whatsoever suggesting (and it is not even alleged) that such failure resulted from Glendale's rejection of TAK's offer. The evidence is overwhelmingly to the contrary. Moreover, there is no evidence indicating that Glendale knew or should have known that a question existed as to whether the signed acceptance had been forwarded. In this regard, George F. Gardner, Glendale's President, states in his declaration that when he signed the application, he had been informed that Daly had signed the letter and sent it back to Sorensen. Further, until TBF filed its motions, he had no reason to believe that Sorensen had not received the signed letter. No evidence has been offered to rebut Gardner's assertion. Finally, aside from being inequitable, dismissal is illogical in light of the fact that the proposed site has been available to Glendale since Sorensen's December 9, 1991 letter and continues to be available if Glendale's application is granted. See Telefax from Sorensen to L. Cohen dated May 15, 1993.

7. TBF also argues, as a separate ground for dismissal, that the current lease with TAK contains a provision which allegedly would block Glendale's access to the site for two years after a denial of TBF's renewal application becomes final. TBF maintains that such a lack of access to Glendale's proposed transmitter site eliminates any claim of reasonable assurance. However, TBF's interpretation is disputed by TAK. Thus, in his December 9, 1991 letter, Sorensen stated that TBF's lease "automatically terminates as a condition of default when a tenant loses [sic] its FCC license...." Further, in his May 15, 1993 letter, Sorensen reiterated that the existing lease would automatically be breached if TBF lost its license.<sup>2</sup> Where, as here, the property owner is willing to negotiate with Glendale and the interpretation of the terms of TBF's lease is in dispute, resolution of the matter rests with the civil courts, not the Commission. See Ninety-Two Point Seven Broadcasting, 55 RR 2d 607, 610-611 (1984). TBF's self-serving interpretation cannot be accepted.<sup>3</sup>

#### TBF's Contingent Motion To Enlarge

8. TBF seeks 10 basic qualifying issues against Glendale. The first two issues stem from the adjudicated misconduct of Glendale principal, Gardner, in a prior unrelated proceeding. In RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642, 644 (1990), the Commission required Gardner to submit a showing of good character in connection with any application for a new station. The Commission stressed that at a minimum, the submission should demonstrate that: (a) the applicant has not been involved in any significant wrongdoing since the alleged broadcast related misconduct occurred; (2) the applicant enjoys a reputation for good character in the community; and (3) the applicant intends to undertake meaningful measures to prevent the future occurrence of FCC-related misconduct. The Commission stated further that such submissions would be subject to the scrutiny of the Mass Media Bureau which could make further inquiries if deemed necessary. Also, persons with adverse information could submit such information to the Commission.

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<sup>2</sup> TAK's interpretation appears to be consistent with Section 10 of the lease which provides that the lease may be terminated upon 30 days notice in case of a default. Section 5 of the lease requires TBF to operate in accordance with FCC standards. If TBF loses its license, it would not operate in a lawful and proper manner, as required by the lease, and thus, arguably, would be in default.

<sup>3</sup> In Alabama Citizens For Responsive Public Television, Inc., 69 FCC 2d 1062 (1978), the Commission was faced with an interim licensee (AETC) who had renegotiated lease terms for the purpose of denying its competitor access to the site. The Commission made clear that such conduct was contrary to the public interest. TBF seeks to distinguish its action from the conduct condemned in Alabama Citizens on the ground that it inherited the two-year holdover provision when it acquired the station from the prior licensee in 1980 and assumed the lease. TBF overlooks the fact that regardless of its origination, it, like the licensee in Alabama Citizens, insists on enforcement of the provision, notwithstanding its anti-competitive effect. TBF's failure to renounce the lease provision makes it as culpable as the licensee in Alabama Citizens.

9. Subsequently, Raystay Company, a corporation in which Gardner is the controlling stockholder filed a number of LPTV applications. In Letter of Roy J. Stewart, Dated July 23, 1990, re: LPTV Applications of Raystay Company, the Chief, Mass Media Bureau, determined that Gardner's rehabilitation submission satisfied the Commission's concerns about Gardner's character and granted the LPTV applications. The Chief ruled, however, that Gardner would have to make similar showings in future broadcast applications.

10. Glendale's captioned application includes an exhibit relating to Gardner's character. In that exhibit, Glendale, among other things, reaffirms the showing of rehabilitation and good character that the Chief, Mass Media Bureau found acceptable.

11. TBF questions the adequacy of Glendale's exhibit and urges the Presiding Judge to add an issue to determine whether Glendale has satisfied the Commission's concerns about Gardner's fitness to be a Commission licensee. TBF argues that Gardner's rehabilitation exhibit is inadequate because it essentially incorporates by reference the submission Gardner made in 1990 in connection with his LPTV applications. Also, TBF argues that the instant exhibit fails to demonstrate that Gardner has followed through on the promises he made to the Commission in 1990. Further, TBF asserts that the instant exhibit does not delineate any details about the implementation of the program that Gardner represented in 1990 he would establish to ensure compliance with the Commission's Rules. TBF also urges the Presiding Judge to add an issue to determine whether Glendale is basically qualified, given Gardner's adjudicated misconduct in the RKO case.

12. The requested issues will not be added. As discussed, above, the Commission delegated to the Mass Media Bureau the task of scrutinizing Gardner's applications to assure Gardner possesses good character. In granting the Raystay Company's LPTV application in 1990, the staff determined that Gardner's rehabilitation submission satisfied the Commission's concerns about Gardner's character. It is also plain that the staff is satisfied with the rehabilitation showing made in the instant application since it declined to request additional information and the hearing designation order does not delineate any deficiencies. In this connection, TBF fails to cite any language in the Commission's Order which supports its argument that Glendale was required to compile a completely new showing for each application and was precluded from incorporating by reference to previous showings. Further, TBF's assertion that the staff failed to review Gardner's showing is baseless speculation. Finally, having delegated responsibility to the staff, the Presiding Judge is without authority to second guess the staff. See Frank H. Yemm, 39 RR 2d 1657, 1658-1659 (1977); see also Annax Broadcasting, Inc., 87 FCC 2d 483, 486 (1981).

13. TBF's request for a general issue as to Glendale's qualifications in light of the RKO decision is similarly defective. TBF is requesting, in effect, the Presiding Judge to overrule determinations of the Commission and the staff. In RKO, the Commission determined that Gardner's misconduct justified his filing of rehabilitation submissions. There is, however, nothing in the Commission's decision indicating that such misconduct should be revisited in future proceedings or should form the basis for the denial

of a subsequent application filed by Gardner. Also, on the facts before him in 1990, the Chief, Mass Media Bureau concluded that Gardner was qualified to be a Commission licensee. While Gardner was still required to make a good character showing in future applications, that requirement was not a holding that Gardner was unqualified with respect to future applications. In the Hearing Designation Order, 8 FCC Rcd at 2481, the Commission held, "Except as indicated by the issues specified below, the applicants are qualified." Glendale was thus found to be qualified to be a Commission licensee. Accordingly, no issues stemming from Gardner's misconduct in the RKO case are warranted against Glendale.

14. TBF seeks site availability and a related misrepresentation/lack of candor issue based on its allegation that the TAK site is not available to Glendale. The issues will not be added. TBF's allegations were fully discussed in the disposition of its motion to dismiss. Suffice it to say that TBF has failed to raise a substantial question of the availability of Glendale's site. The evidence makes clear the site has always been available to Glendale and continues to be available. Further, TBF has utterly failed to provide any evidence of an intent to deceive the Commission, which is an essential element of a misrepresentation/lack of candor issue.

15. TBF's request for a false financial certification issue will be denied. At the time Glendale filed its original application for Miami, it was relying on funds from Gardner as well as a lease letter from The Firestone Company, an equipment leasing company. Gardner's loan commitment letter represented that he had more than sufficient assets to meet his obligations to Glendale. The letter specifically acknowledged, however, that Gardner did not have sufficient "net liquid" assets on hand. The letter went on to state that Gardner had identified specific unencumbered assets which could be readily sold. TBF's claimed basis for adding a false financial certification issue is the absence in Gardner's loan commitment letter of any reference to appraisals of his non-liquid assets. As suggested by the Bureau, the failure to secure appraisals of non-liquid assets (assuming that to be the case) may raise financial qualification questions. However, it is difficult to perceive how intentional deception can be alleged where, as here, there is no claim that Gardner's statement is false in any respect. In this connection, the Bureau's request for a financial issue is also baseless. As noted by Glendale, on March 26, 1992, Glendale amended its application as of right to substitute a bank letter from Northern Trust Bank in lieu of Gardner's personal funds. The Bureau's pleading does not question the availability of these bank funds.

16. TBF also seeks the addition of a reporting issue against Glendale. TBF contends that Glendale failed to include in its application all information required by FCC Form 301 in violation of Section 73.3514(a) of the Rules and failed to maintain the continuing accuracy its application in violation of Section 1.65 of the Rules. The reporting issue will not be added.

17. Question 7(a) of the application form seeks information as to whether the applicant has had or has any interest in "a broadcast station, or pending broadcast station application before the Commission?". Glendale reported the existence of the one LPTV license and the five LPTV construction permits held by Raystay. Glendale did not report 4 pending applications for extensions of

time in connection with the LPTV construction permits. TBF argues that the phrase "pending broadcast station applications" includes every single application relating to a broadcast station already reported in which a principal has or had an interest. Thus, under TBF's interpretation of the question, in addition to reporting past interests in broadcast stations, every routine application, *i.e.*, an application to modify a construction permit or to measure power directly, relating to such interest would also have to be reported. Neither TBF or the Bureau, which supports addition of the requested issue, submits case support for its interpretation of Section 7(a). Moreover, TBF's strained interpretation flies in the face of reason since the purpose of the question is to compel an applicant to divulge its diversification posture and to ensure compliance with the multiple ownership rules. With that purpose in mind, Glendale satisfied the requirement of Question 7(a) by reporting its broadcast station interests (licenses and construction permits). It was not required to report its subsidiary applications for extensions of time.

18. Similarly, its failure to report the filing or grant of additional LPTV extension of time requests following the filing of Glendale's application does not violate Section 1.65. Such requests do not constitute substantial and significant changes in information furnished by Glendale in its pending application. Also, a reporting issue is not warranted because of the recent cancellation of four LPTV construction permits held by Raystay. While Glendale did not file a formal amendment containing the information, its timely reporting of the cancellations in its integration and diversification statement satisfied the fundamental purpose of Section 1.65. See Pinelands, Inc., 7 FCC Rcd 6058, 6064 n. 25 (1992). Also, the failure to report the filing of the grant of an LPTV assignment application does not warrant the addition of a reporting issue. Glendale timely reported the filing of the assignment application, negating any contention that Glendale intended to conceal the transaction. Finally, it is clear that Glendale's failure to file an amendment to report the filing of its pending application for a new television station in Monroe, Georgia was not motivated by an intent to conceal the filing. In this connection, TBF received specific notice when Glendale filed a petition to deny TBF's Monroe station, referencing Glendale's filing of a competing Monroe application. In sum, most of TBF's allegations of reporting violations are baseless. Further, the one or two isolated Section 1.65 violations appear to be inadvertent. In the absence of evidence of intentional deception, a reporting issue is not warranted.

19. TBF seeks the addition of a misrepresentation issue in connection with Raystay's construction permits for four LPTV stations at Lancaster and Lebanon, Pennsylvania. First, TBF argues that the specification of the Ready Mixed Concrete Company site for the Lancaster applications and the Quality Inn site for the Lebanon applications were misrepresentations because Raystay did not have the requisite reasonable assurance. TBF relies in support on affidavits from the contact persons for the two sites, Edward Rick, III, Vice President and an owner of Ready Mixed Concrete Company and Barry March, the General Manager of the Hotel. Both Rick and March indicate in their affidavits that at the time they gave their consents they had a mistaken belief as to the size and weight of the antenna structure.

20. TBF has failed to demonstrate that Raystay committed

misrepresentations when it certified to the availability of the sites. Both sites were acquired on behalf of Raystay by a professional site consultant, Daly of TELSA, Inc. who believes he provided Raystay with reasonable assurance of site availability. Further, there is no evidence that George Gardner was ever informed that the sites were unavailable. Also, Daly's declaration makes clear that no false statements about the site were made in his conversations with Rick and March. Both Rick and March were told that the sites were to be used for a low-power television facility. Also, as conceded by March and Rick in their affidavits, Daly told them that he did not know the dimensions of the structures. Despite any questions they may have had, both agreed to give written consent for the use of their facilities. In sum, while Rick and March may have been under a misapprehension as to the exact size of the proposed facilities, such a misapprehension falls far short of demonstrating an intent to deceive the Commission by Raystay or its principals.

21. TBF also argues that Raystay misrepresented its construction efforts in applications filed to extend the Lancaster and Lebanon construction permits. Raystay's applications for extensions of time signed by George Gardner represented that Raystay "has entered into lease negotiations with representatives of the owners of the antenna site specified in the applications...." The applications also asserted that "[a] representative of Raystay and an engineer have visited the antenna site and ascertained what site preparation work and modifications need to be done at the site." Rick and March dispute both of these assertions. Their affidavits raise substantial questions about the truthfulness of the statements made in Raystay's applications for extensions of time. Further inquiry is warranted and an appropriate issue will be added.

22. TBF also seeks issues to determine whether Glendale made misrepresentations in rehabilitation pledges. TBF argues, in this regard, that Gardner acted in bad faith when he pledged that he would take steps to ensure accuracy and compliance in all dealings with the Commission. TBF bases its request for issues on its allegations, discussed above, in support of other issues sought. The requested issues will not be added. As noted by the Bureau, TBF has failed to demonstrate an intent to deceive on the part of Gardner or Glendale. In addition, the request is superfluous because it is solely based on allegations made with respect to other issues. In this connection, the Presiding Judge has added a limited misrepresentation issue.

23. Finally, TBF requests an issue to determine whether Glendale will construct its proposed station. The request is based solely on Raystay's decision not to build the Lancaster and Lebanon LPTV construction permits. An issue will not be added. TBF has not provided any support for questioning the bona fides of Glendale's application and its request is premised solely on speculation and conjecture. In this connection, the potential audience and revenue of a full-power television station in Miami is vastly greater than that of the unbuilt LPTV stations.

24. TBF's contingent motion for production of documents will be dismissed. As noted by Glendale, Section 1.229(e) of the Rules, relied on by TBF, is inapplicable because this is not a comparative proceeding involving applicants for new facilities. The procedural schedule set forth below will

specify the time allotted for commencing discovery on the added issue including a motion for production of documents, and the time for filing objections.

Accordingly, IT IS ORDERED, That the "Motion To Dismiss Application Of Glendale Broadcasting Company" filed May 13, 1993 by Trinity Broadcasting of Florida, Inc. IS DENIED.

IT IS FURTHER ORDERED, That the "Motion To Strike" filed June 11, 1993 by Glendale Broadcasting Company IS DISMISSED as moot.<sup>4</sup>

IT IS FURTHER ORDERED, That the "Contingent Motion To Enlarge Issues Against Glendale Broadcasting Company" filed May 13, 1993 by Trinity Broadcasting of Florida, Inc. IS GRANTED to the extent indicated and otherwise DENIED, and the following issue IS ADDED:

To determine whether Raystay Company made misrepresentations or lacked candor in low power television applications for extensions of broadcast construction permits and, if so, the effect thereof on Glendale Broadcasting Company's qualifications to be a licensee.<sup>5</sup>

IT IS FURTHER ORDERED, That the burdens of proceeding and proof on the added issue IS PLACED on Trinity Broadcasting of Florida, Inc.

IT IS FURTHER ORDERED, That the "Contingent Motion For Production Of Documents" filed May 13, 1993 by Trinity Broadcasting of Florida, Inc. IS DISMISSED.

IT IS FURTHER ORDERED, That discovery including the request for production of documents SHALL COMMENCE by July 21, 1993, and that any objections to document requests SHALL BE FILED by July 28, 1993, and that the procedural schedule contained in the Order released June 28, 1993 (FCC 93M-418) SHALL APPLY thereafter.

FEDERAL COMMUNICATIONS COMMISSION

*Joseph Chachkin*  
Joseph Chachkin

Administrative Law Judge

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<sup>4</sup> The motion to strike concerns the Bureau's request for addition of a financial issue against Glendale which was made in the Bureau's comments.

<sup>5</sup> Section 1.229(f) provides authority for the Presiding Judge to issue a notice of forfeiture where issues are enlarged to inquire into allegations that an applicant made misrepresentations or engaged in other misconduct during the application process. Since the added misrepresentation issue involving Raystay Company does not concern representations made in this proceeding, a forfeiture notice is not applicable. It is also noted that the alleged violations concerning Raystay Company occurred more than a year prior to issuance of this ruling. See 1.80(c)(3).